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Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of Rescinding Forbearance from the Facilities-Based Requirement of Section 214(e)(1)(A) Of the Act	))))	
Telecommunications Carriers Eligible to Receive Universal Service Support	)))	WC Docket No. 09-197
Lifeline and Link Up Reform And Modernization	))	WC Docket No. 11-42

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PETITION TO RESCIND FORBEARANCE

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Summary

The instant petition makes the case that the elements that must be present to justify forbearance from a provision of the Communications Act are no longer present, and therefore forbearance must be rescinded. Specifically, the Commission has forborne from the "facilities only" requirement of Section 214(e)(1)(A) in the case of several individual Lifeline-only ETCs, and then more recently issued a blanket forbearance from the requirement for all such carriers.

This Petition notes the abuses of the Lifeline system which are well known to the Commission and which drove the Commission's recent attempt to impose strict eligibility verification procedures on Lifeline providers. The abuses have come primarily from non-facilities-based carriers. The facts show that such Lifeline providers have regularly and on a massive scale offered Lifeline service to customers who did not qualify under the Commission's rules.

The specific elements necessary for forbearance which are not now present are:

1. There is a need for enforcement of the facilities-only rule because the proliferation of non-facilities-based providers has led to rates being charged at anti-competitively low levels (free service) that make it impossible for facilities-based carriers to compete.
2. While consumers benefit initially from getting multiple free phones without the requisite eligibility qualifications, they will ultimately lose such service if and when the Commission roots out the abuse. Consumers benefit by getting reliable long term service on a basis that they legally qualify for and by having a choice of providers.
3. Allowing non-facilities-based carriers to qualify for Lifeline ETC status circumvents the application of Section 310 to a major category of service provider. The result is that foreign-owned entities are getting subsidized by US Taxpayers to the detriment of domestic providers. This is not in the public interest.
4. The identity of the underlying facilities-based carrier of non-facilities-based ETCs should be made transparent to the public so that (i) the underlying carriers can be held responsible for the acts of those with whom they do business and (ii) so that consumers can evaluate the reliability and scope of the actual service they are signing up for.

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PETITION TO RESCIND FORBEARANCE

NTCH, Inc. ("NTCH") hereby petitions the Commission to rescind its decision to forbear from enforcement of the provision of Section 214(e)(1)(A) of the Communications Act that requires an Eligible Telecommunications Company to offer service "either by use of its own facilities or a combination of its own facilities and resale of another carrier's services." As set forth below, the circumstances which led the Commission to believe that the factors warranting forbearance were operative no longer hold true. Unless all three of the elements set forth in Section 10(a) of the Communications Act (47 U.S.C. Section 160(a)) are operative, the Commission is not authorized to forbear from any provision of the Act. As will be set forth below, *none* of the three elements that the Commission relied on to forbear from applying the facilities-based requirement to individual carriers or on a blanket basis remain true, if indeed they were ever true to begin with. That being the case, the Commission is required to rescind its forbearance determination and resume applying the statute as written and enacted by Congress.

I. Background

As explained most recently in the Commission's February 6, 2012 "Lifeline Order[1]," the Commission first forbore from the facilities-based requirement of ETC designation in connection with TracFone's 2005 request to participate in the Lifeline program. Since then, the Commission has accorded a number of other ETCs the same forbearance privilege. In the Lifeline Order, the Commission decided to expand its by then well established forbearance policy on a blanket basis. The result is that all Lifeline-only ETCs may receive that designation without having to have their own transmitting facilities as originally ordained by Congress.

This development appears to have spawned a spate of unintended consequences. First, the forbearance action has permitted foreign-owned companies to become major providers of Lifeline service (and thus major recipients of USF support) without the constraints under Section 310 of the Act which govern foreign ownership of licensed facilities.[2] Foreign-owned facilities-based ETC's would have to undergo rigorous FCC and Team Telecom review before they could acquire the licenses needed to offer facilities-based wireless services. Removal of that statutory checkpoint by the forbearance process has thrown open the door to foreign-owned companies to move aggressively into this space and expand their operations by receiving subsidies from the United States government. This cannot have been what Congress intended when it enacted a law limiting ETC beneficiaries to facilities-based entities which, in the wireless context, would either have been US-owned or would have been vetted under the normal Section 310 review process.

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1 *In the Matter of Lifeline and Link Up Reform and Modernization*, WC Docket 11-42, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 6656 (2012) (Paras. 361 – 366) ("Lifeline Order").

2 TracFone Wireless, for example, is owned by Sr. Carlos Slim, a Mexican national.

Equally importantly, the facilities-based requirement serves to ground an ETC in the communities to which it provides service. The ownership of transmission facilities in a given market bespeaks a long-term commitment to the market, an investment in the community, and a permanence of interest. It is like the difference between owning a home and renting a booth in a mall – an ETC that merely resells some other carrier's service offerings on a temporary basis cannot possibly have the stake in the community which a facilities-based provider has. Without facilities, an ETC has no roots and can easily blow out with the wind as market conditions vary. NTCH believes that most of the abuses and even the horror stories which the Commission has discovered[3] have been perpetrated by non- facilities-based carriers. Instead of taking the obvious step of cracking down on such abusive ETCs by re-establishing the facilities-based requirement enacted by Congress and thereby shutting the door on that particular avenue of abuse, the Commission threw the door open wider by adopting a blanket forbearance for all Lifeline providers. Perhaps the Commission considered that enforcement of its strict new eligibility ascertainment requirements would take care of the problem, but a more direct approach would have been to simply rip the problem out at the root by returning to the statute as written. This is what NTCH suggests here is not only good policy but actually required by the Act.

II. The Elements Necessary to Support Forbearance Do Not Exist

Section 10(a) of the Communications Act prescribes three conditions, all of which must be present, for the FCC to forbear from applying a regulation or provision of the Act:

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[3] The Commission appears to be well aware of abusive practices by various ETCs offering Lifeline service. It was these abuses that drove the adoption of strict and far-ranging measures to ensure that the Lifeline rules are being rigorously adhered to.

(1) enforcement of such regulation or provisions is not necessary to ensure that charges, practices, classifications or regulations by, for or in connection with that telecommunications carrier or telecommunications service are just, reasonable and are not unjustly or unreasonably non-discriminatory;

(2) enforcement of such regulation or provision is not necessary for the protection of consumers;

(3) Forbearance from applying such regulation or provision is consistent with the public interest.

47 USC Section 160(a). The Commission and the Wireline Competition Bureau made these findings when they forbore from the facilities-based requirement with respect to individual prospective ETCs and then on a blanket basis. As will be set forth below, actual experience with this particular forbearance action has unfortunately proved the opposite of the Commission's original findings. The Commission must therefore rescind its action based on the facts as it now knows them.

Initially we note that the neither the statute nor the Commission's rules establish a mechanism for rescinding a forbearance once granted. However, the premise of the statutory forbearance process is that the three conditions necessary to justify forbearance must apply for the Commission to forbear in the first place, and they must obviously *continue to apply* for the Commission to continue forbearing. In other words, forbearance is a continuing process that depends on the continued existence of the conditions that justified forbearance initially; once one or more of those conditions disappear, the Commission not only should, but must, rescind its forbearance and resume enforcement of the provision as found in the Act. Nothing in the Act suggests that forbearance is intended to be an immutable or permanent action; it is rather a response to conditions that make enforcement of the statute as written unnecessary. Thus, once the Commission determines that the conditions on which its grant of forbearance was premised no longer exist, forbearance must be withdrawn. This petition establishes that the requisite forbearance conditions do not exist.

1. Practices Engaged in by Non-Facilities-based ETCs have Been Unjust and Unreasonable

The Commission's exhaustive investigation of the Lifeline program as it has actually been administered over the last seven years conclusively established that certain ETC provides were routinely abusing the system by enrolling customers who had not been properly verified as eligible or who had already been enrolled. The improper sales activity by non-facilities-based ETCs was particularly frenetic in the weeks just before the new certification rules went into effect as the window of opportunity to sign people up without due regard for the eligibility rules was seen to be closing. The Commission's staff did nothing to enforce the existing rules and indicated that they were aware that this activity was going on elsewhere. News reports clearly showed abuses in Florida,[4] and TracFone pointed in its May 30, 2012 "Supplement to Petition for Reconsideration" in this Docket to similar practices going on on a massive scale in Missouri. In each instance, the perpetrator was a non-facilities-based ETC. The Commission presumably knows the identity of the other offenders who prompted the need for an administrative crack-down. Since the preponderance – if not a unanimity – of the carriers involved in these practices are non-facilities based, this is ample evidence that the prophylactic measure adopted by Congress was in fact a useful one. Congress made a legislative judgment that restricting ETC status to facilities-based carriers would ensure the best service by ETCs. The Commission deviated from that judgment and has now found that the very classification singled out by Congress for exclusion from ETC status is the one that is now creating the biggest problem.

[4] http://www.cbsatlanta.com/story/17048072/2012/02/29/your-money-wasted-fraud-in-free-cell-phone-program

None of this should be read to condemn all non-facilities-based ETCs. There are probably some in that category who have abided by the rules. But there is certainly enough evidence to conclude that Congress's requirement that ETC's be facilities-based actually did serve a very useful purpose, one that has been dramatically undercut by the Commission's forbearance. Non-facilities-based ETCs have been found to engage in practices that are unreasonable and unjust, not to mention unlawful. They have forfeited the indulgence which the Commission too hastily granted them.

One thing that contributes to the present abuses is the fact that non-facilities-based carriers are not required to disclose the underlying carrier from whom they derive service. This has two negative consequences. First, the subscribing public does not know who is responsible for the underlying service. If the Lifeline service is to be true to its "lifeline" name, it must surely entail the subscriber having access to basic information about the carrier which is providing service. This would allow the consumer to make informed judgments about the reliability of the underlying transmission service that he or she is signing up, especially since the subscriber is otherwise placing his or her sole access to emergency services in the hands of an unidentified facilities provider. Second, if the identity of the underlying carrier had to be revealed to the customer, carriers like Verizon and Sprint might be less inclined to enable surrogates to engage in the kind of shenanigans we have seen, all the while profiting from these activities but being able to disclaim all involvement. Sunshine, as they say, is the best disinfectant.

2. Non-Facilities-based ETCs have Hurt Consumers

The second leg of the forbearance platform is the requirement that enforcement of the statutory provision is not needed to protect consumers. Here the situation is that consumers are being unwittingly drawn into scams that benefit them in the short term but cannot be sustained as the scams are shut down. Like the beneficiaries of a Ponzi scheme, consumers get a short term "high" of free phone service and multiple free phones, but ultimately these benefits will be stripped away as auditing and verification measures identify the multiplicity of phones in a single household. Consumers do not benefit by service being offered and then snatched away simply to improve the bottom line of unscrupulous ETCs. To the contrary, they are being victimized by the abuse of a program which was intended to assist low income people in getting basic phone service but is now being used instead to fatten the bellies of carriers who are feeding at the public trough.

Of course, to the extent that Lifeline service is directed to ineligible recipients and is funded out of the USF pool, all consumers suffer. Every American supports the USF fund by contributions exacted either explicitly or implicitly by the carriers that contribute to the fund. So when waste, fraud and abuse occur, all consumers pay for it through higher USF contribution assessments. There is no free lunch for the consumers who are not only paying full freight for their cell phone service but are also carrying the load of fraudulent Lifeline disbursements.

Again, because non-facilities-based ETCs have no roots in the communities they target and don't have a brand to protect that represents a huge investment in infrastructure, it is easy for them to move into an area, offer a blast of cheap free phones and cell service, and then move on to another area like travelling flimflam men of another era. Facilities-based carriers are there in the market for the long term to serve customers over time, to ensure that they get adequate service, to address coverage or outage problems as they arise, to extend coverage to unserved portions of their study areas, to provide responsive customer care, and generally to have a direct one-to-one relationship with the customer. Facilities based carriers cannot hit and run for a short term profit then move on to another product.

Right now it appears that the non-facilities- based carriers are lining up behind an impending giveaway of broadband services. Catchy populist-sounding rubrics like "Lifeline" are again being used, only now it's "Connect to Compete". The Commission (and its Chairman) should be wary of foreign billionaires who promote competitive broadband connection with a lot of fanfare in this country while at the same time maintaining a near monopoly on telecommunications in their home markets. Advocacy of digital literacy and the virtues of competition would be a lot more compelling if the advocate were not charging monopoly phone rates 10 times higher than ours to a poorer group of less digitally literate citizens in his own country.

3. Forbearance is Not in the Public Interest

The final prong in our analysis must, as always, be to find where the public interest lies. This prong involves all the points we have noted above but also broader policy concerns. Forbearance from the facilities-based requirement has led to massive abuse of the system over the last five years, with millions of dollars being funneled to ineligible subscribers at a time when the USF was already severely overburdened by other demands for support. Thousands of consumers have received subsidized service under the false assumption they qualified, only to now (or soon) learn that their service or their subsidy must be terminated. The Commission has established these facts in the course of identifying fundamental problems in the Lifeline system that required reform. The facilities-based requirement raises other issues too.

As was noted above, the major Lifeline-only CETCs are wireless providers. Facilities-based carriers are, of course, subject to the foreign ownership strictures of Section 310 of the competition, protecting interests of US citizens) that prompted the adoption of Section 310 in the first place. MVNO operators are not subject to any such review because they are not licensees. While this may or may not be a good thing from a national security and competitiveness standpoint, the situation certainly raises questions from a USF standpoint about whether U.S. taxpayers should be subsidizing foreign companies for their operations within our borders.

The obvious example in this case is TracFone, which is owned by Carlos Slim, a Mexican billionaire. The Commission can easily determine how many USF dollars are flowing to Sr. Slim via his Lifeline-supported operation. Given the substantial size and scope of TracFone's operations which have been reported in this Docket, the subsidies must run into the tens of millions dollars. At a time when American businesses are beset on all sides by the poor economy, unemployment, mortgage foreclosures, and a lack of consumer confidence, we can see no public policy justification for supporting foreign-owned entities and foreign billionaires with subsidies. There may well be other foreign owned entities that are also helping themselves to the generosity of the American public, but we will never know since the ETC process does not vet foreign ownership. The point here is not that foreign owners should be disqualified *per se* from participation in the Lifeline program, but rather that they should be required to undergo the same sort of scrutiny for competition and national security as facilities-based carriers must undergo.

In addition, the need for additional Lifeline providers has diminished. When TracFone first was granted forbearance from the facilities-based requirement, there were few Lifeline-only provides in the market. Lifeline service tended to be provided by LECs and mainly on a wired basis. TracFone laid the groundwork for the multitude of Lifeline-only carries that are now competing to offer this service to the public. What that means, however, is that if there was a need to promote the offering of Lifeline service by non-facilities-based carriers seven years ago, that need has long disappeared. There are now multiple facilities-based carriers (including NTCH) which are willing and able to carry the Lifeline standard, so there is no longer a need (if there ever was) to offer a special forbearance to non-facilities-based carriers to ensure that service gets provided.

Finally, in a perfect illustration of unintended consequences, the current situation is effectively undercutting the ability of smaller, facilities-based firms to compete and survive. NTCH is a company that has heretofore eschewed government funding. It has nevertheless survived and modestly prospered by maintaining a low cost, no frills infrastructure that permits it to offer the lowest price offerings of any carrier in the country: unlimited talk , text, and web for as little as $25 a month, including tax. NTCH was one of the first carriers to perceive the need of low-income and credit-challenged people who were ignored by the majors to have access to reasonably priced cell phone service probably the first to provide for these people in rural areas. (It has offered unlimited service for over 12 years in Jackson and Dyersburg Tennessee for the same $29.95 price). Despite its low cost network, it maintains unmatched reliability with call success rates in excess of 99.5% network-wide in its home area. For this reason, NTCH is happy to make its call completion record publicly available to the public in real time, something other carriers are loathe to do. NTCH builds all of its networks using existing infrastructure when appropriate, but adding co-locatable sites that are then made available to competing carriers. NTCH's site building program creates jobs for at least nine subcontractors on each site, as well as its own employees. Additionally the process of starting branded stores involves finding, leasing or buying, and developing real estate often in areas in need of revitalization. Once the network is constructed, NTCH establishes local customer care centers. Not only does this practice create new jobs for the local community but it allows NTCH's customers to speak to someone who can understand their problem first hand because they live in their town rather than a foreign country. Customer care calls, by the way, are answered live within 30 seconds and issues are resolved on the average within 2 minutes. NTCH's story is really the classic American small business success story – employee-owner involvement, hard work, strong customer service, and innovative offerings to local markets.

The Lifeline program, as currently operated under the facilities-based forbearance policy, threatens this business model. Instead, customers can effectively get phone service for free from non-facilities-based competitors because the Lifeline subsidy (sometimes multiplied several times over for the same household) is all that the customer has to pay. No matter how close to the bone NTCH is able to cut its rates to the customer, it cannot offer service for free, which is what its competitors do. NTCH has therefore reluctantly applied to participate in the Lifeline program because it is impossible to compete otherwise. In addressing the continuation of the forbearance policy, the Commission needs to decide whether there is a value to preserving honest, American-owned and operated businesses or continuing the over-subsidization of non-facilities-based carriers whose methods threaten the viability of a truly competitive market.

III. Conclusion

Experience has shown that forbearance from the facilities-based requirement of the Act has led to massive fraud and abuse, a drain on the USF treasury, and hoodwinking of consumers. It has also led to disparate treatment between licensed ETCs and unlicensed ones in terms of the scrutiny they must undergo, first, to initiate operations, and, second, to get USF funding. The shortage of wireless Lifeline providers that may have existed has disappeared, as has the underlying reason for forbearance. Accordingly, the Commission should:

1. Rescind its blanket forbearance of the facilities-based requirement as a qualification for ETC status;

2. Rescind its individual grants of ETC petitions for carriers which have do not have their own facilities, unless within a reasonable period they either become lessees or licensees of spectrum such that they must pass the same basic qualification tests as facilities-based licensees; and

3. In any case, the identity of the underlying carriers which offer the transmission service to non-facilities-based ETCs should be required to be disclosed transparently to the public. If the primary brand of the underlying network is held responsible for the Lifeline products sold on that network, the owners of the network will police this situation on their own. The Commission will be able to limit its own enforcement activity simply by not permitting underlying facilities-based carriers to hide behind CETC entities which are engaged in massive system abuse; instead, the industry will have strong incentives to stop facilitating the very conduct which the Commission has been striving to stamp out.

Respectfully submitted,

NTCH, Inc.

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